

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL
77-4183

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and ITT WORLD COMMUNICATIONS INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY and TRT TELECOMMUNICATIONS
CORPORATION,

Intervenors.

On Petition for Review of
Decision and Order of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.

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On Petition for Review of
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REPLY BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.

Petitioner ITT World Communications Inc. ("ITT
Worldcom") submits this brief in reply to the brief filed
with the Court by respondent Federal Communications Commission
("FCC").

Most of the FCC's brief is devoted to an attempt to answer the arguments raised by Western Union International, Inc. and RCA Global Communications, Inc. in the joint brief which those two petitioners have submitted in its consolidated review proceeding. ITT Worldcom will confine this Reply Brief to a discussion of the FCC's unsuccessful efforts to answer the points made by ITT Worldcom in its separate opening brief, which demonstrated that the FCC's Decision and Order should be reversed by the Court for a number of reasons in addition to those set forth in the other petitioners' brief.*

POINT I

THE FCC HAS WRONGFULLY ABROGATED THE IRCs'
CONTRACTS WITH AT&T WITHOUT MAKING THE
PUBLIC INTEREST FINDING REQUIRED BY LAW.

In its opening brief, ITT Worldcom demonstrated that, assuming arguendo the FCC has statutory authority to regulate the IRCs' contractual arrangements with AT&T,** the

* Intervenor American Telephone & Telegraph Company ("AT&T") has also filed a brief with the Court. Since AT&T chose to limit its brief to a single point and did not address any of the arguments made by ITT Worldcom in its separate brief, AT&T Brief at p. 8, AT&T's brief need not be answered here.

** As ITT Worldcom discussed in its brief, at pp. 7-10, the question of whether the FCC has statutory authority to regulate inter-carrier contracts has not been resolved by the courts. See, Bell Telephone Company of Pennsylvania

[Footnote continued on next page]

FCC's Decision and Order must be reversed because the FCC abrogated or modified the carriers' contracts without first having made the necessary finding that such abrogation or modification is necessary to protect the public interest.

F.P.C. v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

The FCC's brief does not attempt to establish that the FCC found the public interest required abrogation or modification of the IRCs' contracts. Instead, the FCC argues that this question is "not before the court," because the Decision and Order ostensibly left it to AT&T to decide how to remedy the "discrimination" which the FCC had purportedly found. FCC Brief at p. 46.

The FCC's argument is untenable. This Court, among others, has consistently held that it is the practical effect of the Commission's decision which is significant, and not the manner in which the agency chooses to characterize its actions. American Telephone & Telegraph Co. v. F.C.C., 487 F.2d 865, 874 (2nd Cir. 1973); American Telephone & Telegraph

[Footnote continued from previous page]

v. F.C.C., 503 F. 2d 1250, 1279 (3rd Cir. 1974), cert. den., 422 U.S. 1026 (1975). The Court need not resolve this question if it accepts ITT Worldcom's argument that even if the FCC has such authority, the FCC has not exercised it here in the manner required by law. See ITT Worldcom Brief, pp. 11-13.

Co. v. F.C.C., 449 F. 439, 451 n. 12 (2nd Cir. 1971); Nader v. F.C.C., 520 F.2d 182, 202 (D.C. Cir. 1975). Here, the FCC found that the rates specified in the AT&T-IRC lease agreements were unlawfully discriminatory, and ordered that the discrimination be eliminated. It would be "blinking reality"* to hold that an FCC Decision and Order which found the carriers' existing contractual relationships to be unlawful did not result in the abrogation or modification of those contracts.

The issue raised by the FCC's brief as to whether it or AT&T chose the remedy for the "discrimination" the FCC purportedly found is irrelevant to the question of whether the FCC has abrogated the IRC-AT&T leases. As the FCC recognizes elsewhere in its brief (p. 42), the threshold question of whether the IRCs' contracts should be abrogated or modified as unlawfully discriminatory is separate and distinct from the question of what remedy should be adopted after the existing contracts were abrogated. Even if the FCC had left AT&T totally free to choose any remedy it wished to eliminate the alleged "discrimination," it would not alter the fact that any action which AT&T ultimately chose was taken only because the FCC had first abrogated the carriers' existing contractual

* Delta Air Lines, Inc. v. C.A.B., 543 F.2d 247, 267 (D.C. Cir. 1976), quoting from Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970).

relationships. Moreover, despite the FCC's assertions to the contrary, AT&T was not left free to decide how it would proceed in the aftermath of the FCC's abrogation of its contracts with the IRCs. As is amply demonstrated in the joint brief of WUI and RCA Globcom, AT&T had no choice, as a practical matter, except to file tariffs increasing its charges to the IRCs to the same level as the rates it charged the domestic carriers, since any other action would require AT&T to file cost-justification data that, as AT&T had previously informed the FCC, is not yet available.*

The FCC is understandably reluctant to address the question of whether its Decision and Order are in the public interest. For, as ITT Worldcom demonstrated in its opening brief, the public interest will not be served by the FCC's actions. The IRCs and, indirectly, their customers will bear significantly increased costs, yet the domestic carriers - which are presumably the "victims" of the "discrimination" at issue here - will not be helped in the slightest if

* This case is therefore distinguishable from National Association of Motor Bus Carriers v. F.C.C., 460 F.2d 561 (2nd Cir. 1972), on which the FCC heavily relies. In that case, the FCC gave AT&T a "free hand," 460 F.2 at 566, to decide how to rectify a discriminatory tariff. Here, AT&T had no real choice other than to do exactly what it did, i.e., raise its rates to the IRCs to match those of the domestic carriers.

the IRCs are forced to increase their payments to AT&T.* In the circumstances, the conclusion is inescapable that the FCC has ignored the impact which its abrogation of the IRC-AT&T contracts will have on the public, and the Decision and Order must be reversed. RCA Global Communications, Inc. v. F.C.C., 559 F.2d 881 (2nd Cir. 1977).

POINT II

THE FCC HAS FAILED TO ESTABLISH THAT THE PROCEDURES IT EMPLOYED WERE ADEQUATE

The FCC's brief makes a considerable effort to establish that it was not required to hold an oral evidentiary hearing of the type specified by Sections 5-8 of the Administrative Procedure Act, 5 U.S.C. §§554-557. FCC Brief, pp. 28-33. However, as ITT Worldcom pointed out in its opening

* The FCC's brief suggests, in a footnote (p. 46, n. 36), that elimination of the differences in AT&T's charges to the IRCs and the domestic carriers provides an adequate public-interest rationale for the FCC's actions. While it may well be that the elimination of a discrimination which was injuring the public or, e.g., a disfavored competitor might in some circumstances justify the abrogation of inter-carrier contracts, that is clearly not the case here. The domestic carriers do not compete with the IRCs and therefore are not being injured by the allegedly preferential rates which the IRCs are obtaining from AT&T. Indeed, the domestic carriers' competitive position will be worsened by the Decision and Order, since their competitor, AT&T, will receive an additional \$5 million from the IRCs as a result of the FCC's actions. Thus, even a superficial analysis refutes any argument that the public interest is served by eliminating the differences in rates charged the IRCs and the domestic carriers.

brief, the FCC is required to adopt procedures which are adequate to resolve the issues before it even in those cases in which it is not required by law to hold a formal adjudicatory hearing. See, e.g., Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1251-54 (D.C. Cir. 1973) and the cases cited at p. 15 of ITT Worldcom's principal brief. The FCC's brief fails to refute ITT Worldcom's demonstration that the notice-and-comment procedures employed by the FCC here were not sufficient, in the circumstances of this particular case, to permit the FCC to resolve the issues it was purporting to decide.

A. The FCC Failed to Develop an Adequate Record.

The authorities cited by ITT Worldcom in its opening brief, at p. 15, establish that "the Commission has an affirmative duty to inquire into and consider all relevant facts" and to "see to it that the record is complete." Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965), cert. den., 383 U.S. 911 (1966). As ITT Worldcom pointed out, the FCC has failed to meet this affirmative duty here because, inter alia, the FCC failed to obtain data on AT&T's costs of serving the IRCs and the domestic carriers which would permit it to determine whether the difference in AT&T's charges to the two groups of carriers were justified.

The FCC's Brief, at p. 26, concedes that "a provable difference in cost to the carrier could be a possible justification for differences between the tariff and contract rates." Yet, the FCC offers no excuse for its failure to discharge its "affirmative duty" to inquire into this "possible justification" for the IRCs' contract rates before reaching its decision. Instead, the FCC seeks to evade the issue by (1) arguing that the IRCs have waived their rights to appeal from the FCC's failure to obtain cost data from AT&T and (2) asserting, without adequate support in the record, that an investigation of AT&T's cost data would have shown that the differences in AT&T's charges to the IRCs and the domestic carrier were not cost-justified. However, these arguments are not well-founded, as the following discussion will demonstrate.

The FCC's "waiver" argument is based on Section 405 of the Communications Act, which prohibits judicial review of "questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." The FCC concedes that the IRCs requested the FCC to investigate AT&T's costs before it entered its Order, but complains that the IRCs' requests were set forth in pleadings which technically sought rejection

of AT&T's tariffs rather than reconsideration of the Decision's holding that the IRCs' contract rates were discriminatory.*

The FCC's argument misconceives the meaning of Section 405:

"On its face, §405, commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party." Office of Communications of United Church of Christ v. F.C.C., 465 F.2d 519, 523 (D.C. Cir. 1972). See also, Wilson & Co. v. U.S., 335 F.2d 788, 794 (7th Cir. 1964), remanded on other grounds, 382 U.S. 454 (1966).

Here, the FCC has not only been "afforded the opportunity to pass" on the question of whether AT&T should be required to file data on its costs, but has affirmatively held in its Order that the Commission staff properly decided not to require AT&T to comply with the FCC regulations which would have required cost-justification for AT&T's tariff filing that was to replace the IRCs' lease agreements. (JA 715, n. 25) Section

* The IRCs can hardly be faulted for not requesting that AT&T be directed to file cost data until after AT&T had filed its tariffs without any supporting cost justification. In its order denying RCA Globcom's request for a stay of its original Decision, (JA 327), the FCC stated that "many of the concerns [of the IRCs] could be alleviated in light of the tariff revisions and justification" which might subsequently be filed by AT&T. (JA 328; emphasis supplied). It is therefore apparent from the record that the FCC was not prepared to consider the necessity of ordering AT&T to provide cost data until it became clear that AT&T would not submit such data voluntarily with its tariff filing.

405 requires nothing more, and the FCC's argument that the IRCs waived their rights to complain about the lack of cost data in the record should be rejected by the Court.

The FCC's second argument, that an investigation of AT&T's costs would have shown that AT&T's different rates to the IRCs and the domestic carriers were not cost-justified, cannot excuse the FCC's failure to obtain the factual data necessary to verify this unsupported assumption. The FCC's argument is based entirely on the FCC's own characterization of an oral statement which was made by an AT&T representative who offered no supporting economic data. (JA 656) This statement should be compared with the contradictory remarks made by another AT&T employee during one of the meetings between AT&T and the FCC's staff, in which the AT&T employee indicated that there were in fact differences in AT&T's costs of serving the IRCs and the domestic carriers. (JA. 338)

Despite the FCC's arguments, it is thus by no means clear that the FCC would not have discovered upon investigation that the IRCs' contract rates were cost-justified. Indeed, the apparent contradictions between the ambiguous comments of the two AT&T representatives, and the complete absence from the record of any probative quantitative data on AT&T's costs, underscores the FCC's failure to meet its obligation to develop a complete record before reaching its decision. Neither the

FCC, the IRCs nor this Court should be left to guess about a question so critical to this case as the cost justification of AT&T's rates to the IRCs. The Court should therefore vacate the Decision and Order, and remand the case to the FCC so that it can meet its affirmative duty to develop a record which is adequate to support whatever decision the Commission ultimately reaches.

B. The FCC Erroneously Placed the Burden of Proof on the IRCs.

ITT Worldcom demonstrated in its opening brief (pp. 17-18) that, in the circumstance of this case, it was erroneous to place the burden on the IRCs to justify their contract rates, because the IRCs lacked access to the information necessary to meet that burden. The FCC's brief argues that once a "prima facie discrimination" is shown, the burden of proof must necessarily, as a matter of law, fall on the IRCs. The FCC's mechanical approach to the allocation of the burden of proof is inconsistent with the case law cited in ITT Worldcom's opening brief, which shows that the burden of proof cannot be assigned automatically or arbitrarily, but must be allocated as required by the circumstance of the particular case, after a reasoned analysis which takes into account such factors as the nature of the matter to be proven and the availability of the necessary evidence to the various parties.

As ITT Worldcom's initial brief demonstrated, the FCC's decision to place the burden of proof on the IRCs was erroneous in view of the posture of this particular case, and should be reversed by the Court.*

C. The FCC's Brief Fails to Answer ITT Worldcom's Argument that the FCC Did Not Make the Necessary Findings to Support the Remedy It Adopted.

The FCC concedes that "the discrimination issue is plainly separable from the remedy problem." FCC Brief, p. 42. However, the FCC's Brief does not address ITT Worldcom's argument that, assuming the FCC properly found AT&T's rates to the IRCs were unlawfully discriminatory, the FCC's remedy for that "discrimination" was both unsupported by the necessary findings and ineffectual to eliminate the danger to the domestic carriers with which the FCC was ostensibly concerned. See ITT Worldcom Brief, pp. 18-23.

As discussed in ITT Worldcom's principal brief, the FCC presently has no basis for determining if the rates charged by AT&T to the domestic carriers are too high, if the contract

* It should be noted that the FCC's brief does not attempt to explain how the IRCs could be expected to obtain the information from AT&T and the domestic carriers which was necessary to permit them to meet their burden of proof. Obviously, AT&T had no incentive to provide such information voluntarily, since the only "penalty" it would suffer if the FCC found the IRCs' lease agreements discriminatory would be a substantial increase in the amounts it received annually from the IRCs.

rates charged the IRCs are too low, or if some other rate will ultimately prove to be reasonable and cost-justified. Moreover, the FCC has now conceded that the IRCs may ultimately be able to prove that they are entitled to lower rates than the domestic carriers by virtue of AT&T's lower cost of serving them. See Addendum B to the FCC's Brief, p. B-1, n.1. Under these circumstances, the FCC might reasonably have been expected to follow the precedent of its decision in System Tariff Offerings* (see ITT Worldcom Brief, pp. 20-21) and maintain the status quo by leaving the AT&T-IRCs contracts in effect pending further investigation. Yet the FCC unaccountably and without explanation required AT&T to raise its rates to the IRCs immediately, to match the higher rates being paid by the domestic carriers. In so doing, "the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

Nowhere in the Decision and the Order does the FCC attempt to explain why it was so urgent that it force upon AT&T a rate increase which that carrier neither sought nor attempted

* 46 F.C.C. 2d 413, 434-35 (1974), aff'd., Bell Tel. Co. of Pa. v. F.C.C., supra.

to justify. The answer cannot be found in the FCC's supposed concern for the domestic carriers, for as ITT Worldcom's main brief pointed out, those carriers are not helped in the slightest by the fact that the IRCs will be required to pay the same high rates which they are charged. Indeed, the danger which the FCC perceived in its Order -- the possibility that AT&T was overcharging the domestic carriers with which it competes -- can never be eliminated by increasing the amounts which the IRCs pay AT&T. If the domestic carriers are overcharged, they will continue to be overcharged even if the IRCs are forced to share their predicament.

The FCC's choice of remedy is thus both unsupported by the necessary findings and unrelated to the danger the FCC was ostensibly correcting. See, Burlington Truck Lines v. United States, supra. The FCC's Decision and Order should be therefore vacated until the FCC's promised investigation of AT&T's costs permits the FCC to establish reasonable rates for AT&T's services in a knowledgeable and rational fashion.

CONCLUSION

The FCC's Order and Decision should be reversed, and the tariffs filed by AT&T in response thereto should be held to be void, unlawful and of no effect.

Dated: New York, New York
December 2, 1977

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CERTIFICATE OF SERVICE

1. I am an attorney associated with the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for petitioner, ITT World Communications Inc.

2. I hereby certify that the attached reply brief was this day served on all parties to this proceeding. At my direction, copies of the reply brief were delivered by hand to the following counsel of record at the listed addresses:

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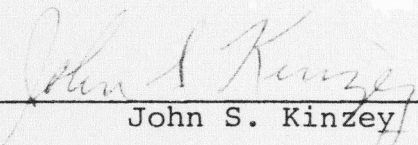
3. I have served all remaining parties to the proceeding by mailing true copies of the reply brief, first class mail, postage prepaid, to the following persons at the listed addresses:

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